Supreme Court, U.S.
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No. 85-1969

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE CITY OF OAKLAND, a charter city
and municipal corporation,
Petitioner,

v.

THE OAKLAND RAIDERS; ALLEN DAVIS;
EDWARD W. MCGAH; LOUIS F. BARROERO;
FRANK IVALDI; SHELDON MILENBACH; JOHN BROOKS;
EUGENE BOSCACCI; JULIUS S. HARTMAN; GLADYS SARGENT;
HENRY TRIONE; RALPH J. VAIL; W.H. WINKENBACH;
E. J. MCGAH; DYNAMIC DEVELOPMENT CO.;
OLIVER HOMES, INC.; ARNOLD BOSCACCI;
ANDREWS CONSTRUCTION CO.; RALPH J. VAIL, Trustee;
and LOS ANGELES MEMORIAL COLISEUM,
Respondents.

**On Petition for a Writ of Certiorari
to the Court of Appeal of California,
First Appellate District**

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

INTRODUCTION

This case raises fundamentally important questions about the separation of powers between the judicial and legislative branches, and between the federal and state governments. In this case, a California court abrogated the authority of the City of Oakland to exercise eminent domain powers which, contrary to

the Raiders' allegation on page 7 of their brief, were *specifically delegated* to it by the State's legislature. The lower court based its decision solely on dormant Commerce Clause grounds, in the absence of any action by Congress to preempt, regulate, or even affect the field. This judicial invalidation of inherent state powers occurred without the minimum federal political protection required by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985).

The Raiders' brief in opposition addresses none of the above issues, does not refer even once to *Garcia*, and fails to explain why the lower court reasoning would not invalidate a host of other state and local eminent domain actions. Instead, the Raiders raise a new "two court" argument. This argument is invalid because the interest of the State and the City in acquiring the Raiders' franchise has been accepted as legitimate by the California Supreme Court and Court of Appeal in this action, and because no federal interest recognized by this Court would be infringed upon by this acquisition. The balance scale "weighing" analogy offered by the Raiders compels a decision in favor of the City. There are recognized weights in the state's pan, however light the Raiders may argue them to be, but there are no weights at all in the federal pan.

ARGUMENT

The Commerce Clause issue was one of the twenty-eight separate affirmative "defenses"[1] raised by the Raiders. 2 C.T. 226. Contrary to the suggestion on page 4 of the Raiders' brief, almost all of the Raiders' other "defenses" were either abondoned at trial, dismissed by the trial court, foreclosed by the California Supreme Court in *City of Oakland v. Oakland Raiders,* 32 Cal.3d 60, 183 Cal.Rptr. 673, 646 P. 2d 835 (1982), or rejected by the California Court of Appeal in *City of Oakland v. Superior Court*,

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[1] California does not recognize "defenses" to condemnation actions. Property owners are permitted to raise *objections* to the taking of the property. Cal. Code Civ. Proc. § 1250.360. The Commerce Clause was not raised by Respondent Los Angeles Memorial Coliseum among its sixteen "affirmative defenses." 2 C.T. 171.

150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983).[2] The Commerce Clause was the sole basis for the decision which the City seeks to have this Court reverse. As stated by the Court of Appeal, "Our conclusion on the commerce clause obviates the need for further consideration of the [remaining] public use and antitrust arguments." Petition, Appendix 8a.

The Raiders contend that by "denial of review by the California Supreme Court, California has announced that California gives slight weight to the local interest of the City of Oakland. . . ." Raiders' brief, page 7. That contention distorts California law and procedure. Denial of a petition for review by the California Supreme Court is not an expression of the Supreme Court's opinion on the merits of the case, or on the correctness of the judgment or any statements in the Court of Appeal opinion. *People v. Triggs*, 9 Cal.3d 884, 890, 106 Cal.Rptr. 408, 412, 506 P.2d 232, 236 (1973); *People v. Davis*, 147 Cal. 346, 350, 81 P. 718, 720 (1905); cf. California Constitution, article 6, section 11.

The California Supreme Court's view of the City's action is expressed only in its opinion in *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 183 Cal.Rptr. 673. 646 P.2d 835 (1982). There, the court rejected the Raiders' primary arguments and held that the Raiders' franchise was "property" subject to eminent domain.

> Government Code section 37350.5, as amended, provides: "A city may acquire by eminent domain *any property* necessary to carry out any of its powers or functions." [Italics by the court.]
>
> [This] law appears to impose no greater restrictions on the exercise of the condemnation power than those which are

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[2] The trial court's first set of conclusions was vacated by the California Court of Appeal in 1983. *City of Oakland v. Superior Court*, 150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983). The trial court judgment based on six independent reasons was vacated as being erroneous as a matter of law. The Raiders' contentions, also on page 4 of their brief, of "conspiracy" are irrelevant misrepresentations of the trial court's conclusions and merely restate positions of the Raiders which the trial court refused to adopt. See, e.g., 3 C.T. 311-313, 1445.

> inherent in the federal and state Constitutions. Further, the power which is statutorily extended to cities is not limited to certain types of property.

32 Cal.3d at 65, 183 Cal.Rptr. at 676, 646 P.2d at 838, citation omitted. The court then reviewed the public use doctrine as it relates to public recreation:

> The example of Candlestick Park in San Francisco and Anaheim Stadium in Anaheim, both owned and operated by municipalities, further suggest the acceptance of the general principle that providing access to recreation to its residents in the form of spectator sports is an appropriate function of city government.

Id., 32 Cal.3d at 71, 183 Cal.Rptr. at 680, 646 P.2d at 841. The California Supreme Court recognized the essential need to preserve the separation of governmental powers in this case:

> We caution that we are not concerned with the economic or governmental wisdom of City's acquisition or management of the Raiders franchise, but only with the legal propriety of the condemnation action. In this period of fiscal constraints, if the city fathers of Oakland in their collective wisdom elect to seek the ownership of a professional football franchise are we to say them nay? And, if so, on what legal ground? Constitutional? Both federal and state Constitutions permit condemnation requiring only compensation and a public use. Statutory? The applicable statutes authorize a city to take "any property," real or personal, to carry out appropriate municipal functions. Decisional? Courts have consistently expanded the eminent domain remedy permitting property to be taken for recreational purposes.

Ibid. The point was reaffirmed by the court in its concluding paragraphs:

> [T]he Raiders assert its view that a professional football franchise is not a proper subject for eminent domain. We repeat what is necessarily implicit in our opinion: *Under the present statutory scheme, the courts have no authority to*

> *choose those items of property which they deem appropriate for condemnation.*

Ibid., 32 Cal.3d at 76, 183 Cal.Rptr. at 683, 646 P.2d at 845, italics added.

The California Supreme Court decision held that the Raiders' property could be acquired by eminent domain under state law, that the City was authorized by the California Legislature to exercise the State's power in this manner, that the City's recreational purposes were consistent with traditional public use doctrines adopted in California as well as other states, and that the judiciary is not empowered to question or evaluate the wisdom of this exercise of legislative power. These holdings repudiate the Raiders' assertion that, under the "two court rule," California gives "slight weight to the local interest of the City of Oakland and has not delegated to Oakland any right to exercise eminent domain in these circumstances." Raiders' brief, p. 7.

The Raiders' "two court rule" and "slight weight" argument is further undercut by the lower court decision which the City asks this Court to review. The California Court of Appeal belittled the City's interest in acquisition of the Raiders' franchise, but nevertheless "presumed . . . legitimate . . . reasons: to promote public recreation, social welfare, and to secure related economic benefits, as well as to best utilize the stadium in which the Raiders played." Petition, Appendix 8a. These are legitimate public purposes as a matter of law. See: *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

The Raiders have asked this Court to "conjure up the picture of the two pans of a balance scale; in one pan is the state interest, in the other the national." Raiders' brief, p. 8. As shown above, the state's interest is both substantial and legitimate, as recognized by the California Supreme Court and as presumed by the California Court of Appeal. Under the three arguments advanced by the City in its petition to this Court (Petition, pages 4-18), there is nothing to be placed in the "national" (federal) pan and no weighing by the judiciary is necessary.

First, under *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), no judicial weighing should occur because the City's sovereign power of eminent domain should not be curtailed by the dormant Commerce Clause in the absence of Congressional deliberation and action. Petition, pages 8-10. Cf. *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 54 U.S.L.W. 4505, 4509-4512 (U.S., May 27, 1986) (Nos. 84-871, 84-889, 84-1054, 84-1069).

Second, the market participant doctrine prohibits any weight being placed in the federal balance pan. The City's point, which is not discussed in the opposing briefs, is that almost all of the supposed burdens on interstate commerce identified by the Court of Appeal are not a necessary consequence of this action. These burdens could arise, if at all, only from City *participation* in the market *after* acquisition of the NFL franchise by eminent domain. Even if, after acquiring the Raiders' franchise, the City were to act in such a way as to burden the commerce of the National Football League, such acts would not be subject to Commerce Clause restrictions because of the market participant doctrine. Although the Raiders describe the applicability of that doctrine to the present case as "mindless" (Raiders' brief, p. 3), there are no legally or logically significant reasons for distinguishing this case from *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In each of those cases, the local government was participating in the market place in order to accomplish a public purpose, and using its governmental powers to do so.

Third, all the burdens upon commerce identified by the lower court are indirect and insubstantial. As such, they do not violate the Commerce Clause and no federal interest is placed upon the balance pan. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). None of these supposed "burdens" —hypothetical restrictions upon NFL franchise owners, an "allegiance to the local public interest," or the fear of "a single precedent"—has any weight. The NFL's commerce cannot be burdened because the NFL itself can easily eliminate every identified burden. The NFL never has opposed the City's action

and it has actively opposed the Raiders' move from Oakland to Los Angeles. The NFL wants this franchise in Oakland.[3] Because the NFL may itself remove any perceived burden on its commerce, no weight may be placed upon the federal pan.

CONCLUSION

This is not a "two court rule" case. This is an eminent domain case where a state appellate court has held that, even in the absence of Congressional action, the exercise of the state's sovereign power of eminent domain violates the Commerce Clause of the Constitution of the United States. That decision is an impermissible extension of judicial power under the dormant Commerce Clause. As described in the City's petition to this Court, the lower court's decision conflicts with decisions of this Court, with a decision of the Ninth Circuit Court of Appeals,[4] and with

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[3] See generally: *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, (9th Cir., June 16, 1985) (Nos. 83-5907, 83-5908, 83-5909).

[4] The City's argument, which the Raiders found "so murky as to be unintelligible" (brief, p. 11), is simply this: the Ninth Circuit found that a franchise owner's interest in relocation outweighed the NFL's interest in preventing relocations. Here, the state appellate court found that the interest of the City—as an owner—in keeping the franchise in Oakland was outweighed by the NFL's supposed interest in freely movable franchises. Because both decisions ultimately are based on the Commerce Clause, (antitrust and "undue burden"), the decisions are in conflict.

the decisions of other state courts. Review and reversal of the decision is necessary to prevent unwarranted attacks—based upon dormant Commerce Clause grounds—on many state and local government actions.

Dated: June 18, 1986.

Respectfully submitted,

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